

THE STATE OF SOUTH CAROLINA

In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Clifton Newman, Circuit Judge

Appellate Case No. 2024-001028

Adele J. Pope.....Appellant,

v.

Alan Wilson, in his capacity as Attorney General of South Carolina,.....Respondent.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

Petitioner Adele J. Pope (“Petitioner”) replies to the Return of the South Carolina Attorney General (“AG” or “Respondent”) to the Petition for Writ of Certiorari. The AG’s Return does nothing to dispel that the spirit of the South Carolina Freedom of Information Act supports granting the writ.

As argued in the Petition, this case presents novel issues of law. The AG’s Return highlights the important public policy at issue in this case: does the South Carolina Freedom of Information Act allow a public body to create its own restrictive definition of “receipt” to avoid any obligation to comply with the FOIA? According to the AG’s Return, the answer is a resounding “yes.” The AG interprets the Court of Appeals’ opinion in this case as an approval of the AG’s argument that the AG’s own opinion of what constitutes “receipt” of a FOIA request

is final and unquestionable. Petitioner submits, however, that this court should not be bound by the agency's own interpretation. Rather, the court should exercise its independent judgment and not defer to an agency's interpretation of the law simply because the statute is silent. The South Carolina Constitution assigns the responsibility and power to adjudicate controversies for the parties to the judiciary, not the state agencies. The recent United States Supreme Court case of Lober Bright Enterprises v. Raimondo decided June 28, 2024, 603 U.S. __ (2024) makes clear why the judiciary is the appropriate decision maker over controversies. Petitioners would refer this court to the Raimondo opinion in further support of this Petition so as to clarify that the Judiciary is the appropriate place for legal interpretation in South Carolina.

Where the AG has admitted that its counsel of record received the June 30, 2011 FOIA request which is the subject of this case [R. 193, ¶17], and where the AG's office acknowledged it was aware of the request *prior to the filing of this case* [R. 201], the circuit court's order and the court of appeals' opinion simply deferring to the AG's interpretation of its own action set a precedent requiring review by this court.¹ This is particularly so because the FOIA states explicitly that "provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a

¹ Petitioner acknowledges that the court of appeals' unpublished opinion is not binding precedent, it remains a vindication of the AG's conduct in this case. Petitioner further notes that the first dismissal of this case (reversed by the court of appeals in 2019) was based on 2002 circuit court decision which had never been reviewed by an appellate court in South Carolina. [R. 17] Also of note is that although the Court of Appeals was presented with the argument that dismissal was required because AG had not properly received the FOIA request, in its 2019 opinion the Court of Appeals did not dismiss the FOIA request on that ground. Rather, the case was remanded with direction for the lower court to determine if valid reasons existed to deny the FOIA request.

minimum cost or delay to the persons seeking access to public documents. . .” See S.C. Code Ann. §30-4-10.

The AG has never disputed that it received the June 30, 2011 FOIA request. It has instead argued that the request *must* have been received by the AG’s custodian of records from Petitioner to trigger any obligation for the AG to respond. This position is unsupported by any statute in the FOIA and is at odds with the above-quoted language requiring that the FOIA be construed to maximize efficiency and transparency.

Contrary to the AG’s argument and the court of appeals’ opinion, the FOIA contains no provision allowing a public body to impose restrictive requirements for how the public body is willing to receive FOIA requests. The AG goes so far as to offer this additional sustaining ground for the court of appeals’ result, although, the AG’s Return herein states “her request **WAS DIRECTED** to the “Custodian of Records” at the Attorney General’s Office, not a law firm.” (Return p. 9 – emphasis added)

5. As an additional sustaining ground, whether Petitioner may pursue her 2011 FOIA request when she already has the appraisal at issue? [Return at 1]

The AG’s suggestion that this logic could support dismissal of a FOIA case is incorrect. The FOIA contains no exception, limitation or even reference to documents which may already be in the requestor’s possession. The AG has refused to produce its copy of the appraisal, so there is no way to know whether this document is the same or different from any document which Petitioner already possesses.

In response to Petitioner’s argument regarding the court of appeals’ reversal of its own 2019 remand instructions in this case, the AG argues that Petitioner reads the 2019 opinion too restrictively. At oral argument on April 2, 2024, Judge Thomas clearly summarized the outcome

of the previous appeal, stating “This court actually remanded this case with [the] request for something that needed to be done, that is, what matters would not be provided under FOIA because of discovery. And it needed to be specifically ruled on. And yet, here we are; it has yet to be ruled on. What happened below?”²

Confoundingly, the AG’s lengthiest argument is that this Court should not grant a writ of certiorari because the AG is offended by Petitioner’s March 29, 2024 Return to the AG’s March 19, 2024 letter notifying the court of appeals that the AG had discovered it *did* possess a copy of the appraisal which had then been the subject of more than 12 years of litigation in this case.³ Prior to that letter, the AG had insisted in all filings and correspondence that it *never* had a copy of the appraisal, and the circuit court dismissed this case in 2021 with the belief that the AG did not have the document. This revelation was disclosed just two weeks prior to the scheduled oral argument in this case, and addressed matters outside the record on appeal in this case. Petitioner quickly filed a return addressing what effect the AG’s revelatory disclosure might have on this case, as it was unclear whether the court of appeals would entertain this matter which was not in the record on appeal.

The AG, disregarding the extraordinary nature of its own post-record filing, immediately moved for sanctions against Petitioner for responding to its letter. While the AG spends the bulk of its Return complaining about Petitioner’s March 29, 2024 filing, that document has no bearing

² Video transcript, https://media.sccourts.org/COA_Videos/2021-000518.mp4, April 2, 2024, at 0:58.

³ Petitioner notes that the AG’s counter-statement of the case relies on allegations made in the March 19, 2024 letter and fails to provide in its statement of the case (p. 1 – p. 5) or its factual background (p. 6 – p. 8) adequate known facts on which to base its argument, especially Argument III.

on the current posture of this case. The court of appeals orally denied the AG's motion for sanctions at the April 2, 2024 oral argument, and the AG did not file a petition for rehearing or petition this Court for a writ of certiorari. The AG's complaints about the March 29, 2024 Return have already been raised, argued and ruled upon by the court of appeals, and the court of appeals' denial of that motion is now the law of the case.

Conclusion

For the reasons set out herein, as well as in the Briefs of Petitioner and the record in this matter, Petitioner submits that this Court should grant a writ of certiorari, reverse the Court of Appeals and circuit court which dismissed on the ground the AG did not receive the FOIA request, and remand the matter with instructions for the Attorney General to provide a full and proper hearing on any exception to providing the requested FOIA documents as set out herein.

Respectfully submitted,

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